2001

Why a *Federal* Death Penalty Moratorium?

Rory K. Little
UC Hastings College of the Law, littler@uchastings.edu

Author: Rory K. Little

Source: Connecticut Law Review

Citation: 33 Conn. L. Rev. 791 (2001).

Title: *Why a Federal Death Penalty Moratorium?*

Why a *Federal* Death Penalty Moratorium?

RORY K. LITTLE*

Would American society be any worse off if the death penalty were abolished? I do not think so. Are there significant problems in the administration of capital punishment, such that many persons lack confidence in the neutrality and fairness of the penalty? I believe there are.

Thus it is difficult to muster enthusiasm for an "anti-moratorium" essay. Yet the fuzzy, even disguised, nature of the advocated justifications for a moratorium on all currently-imposed death penalties make a critique possible, and even helpful to advocates and opponents alike.

Particularly regarding the *federal* death penalty system, the justifications for a "moratorium" seem unpersuasive.[1] There appear to be no plausible "actual innocence" claims among the 20 defendants currently on federal death row.[2] While there are claims of racial and geographic disparity, it is unclear why those claims should provide relief for Caucasian murderers like Timothy McVeigh, or other clearly guilty multiple-victim or heinous killers, no matter what their ethnicity. Further study of these problems of administration (that is, the influence of race and prosecutorial discretion) is undoubtedly valuable, and should continue. But unless there is some plan also to reverse the legal doctrines that govern these areas (most prominently, *McCleskey v. Kemp* regarding racial disparity[3] and *United*

* Professor of Law, Hastings College of the Law, University of California; littler@uchastings.edu. J.D., Yale 1982, B.A., University of Virginia, 1978. Professor Little served as an Associate Deputy Attorney General on the Capital Case Review Committee of the United States Department of Justice during 1996-97. Thanks to Ash Bhagwat, Richard Dieter, Evan Lee, and Jon Schwartz for their comments (if not wholehearted agreement); to Daniel Pollack, Hastings Class of 2002, for unfailing research assistance; and to Suzanne Menne for steadfast clerical assistance.

1. *See* Citizens for a Moratorium on Federal Executions, http://www.federalmoratorium.org (visited on Mar. 29, 2001).

2. *See infra* text accompanying notes 49-111; Death Penalty Information Center, *Federal Death Row Prisoners, available at* http://www.deathpenaltyinfo.org/fedprisoners.html (updated Feb. 8, 2001) (listing the twenty current federal death row defendants) [hereinafter Death Penalty Information Center]. The number of people on federal death row is a constantly shifting number, as some defendants have had their sentences reversed (six so far) or commuted (President Clinton commuted the death sentence of Ronald Chandler, a white drug dealer, on January 20, 2001), *id.*, while others are added intermittently via new federal prosecutions.

3. 481 U.S. 279 (1987); *see infra* text accompanying notes 20, 22 (discussing *McCleskey*).

States v. Armstrong for geographic disparity and other discretionary unevenness[4]), then all the study in the world will not result in the judicial vacation of currently-imposed death sentences. Nor does it seem likely that the executive or legislative branches would act independently to commute all federal death sentences, absent reason to believe that the prevailing legal standards in this area have been violated.

The twenty defendants currently on federal death row all seem to belong there. Alteration in the foundational premises of our capital punishment jurisprudence seems unlikely; certainly, moratoria advocates have announced no plausible plan for this to occur. Thus a federal moratorium would seem to be merely putting off the inevitable, without describing any good to come of the movement. Other than as a stopgap substitute for abolition, a death penalty moratorium seems, at least as applied to the federal system, to be unjustified.

I. "MORATORIUM" DOES NOT MEAN ABOLITION: WHAT IS ITS PURPOSE?

"Moratorium" is defined as a "temporary ban," a "suspension of activity," a "period of delay."[5] It should not be, as Ronald Tabak's article suggests, a disguised vehicle for abolition, a Trojan Horse for anti-death penalty advocates. If we take "moratorium" advocates at their word, then the word by its very definition forces the obvious question: why? What, precisely, will occur during the temporary suspension of executions that moratorium advocates request? What benefit(s) to the criminal justice system will be gained? Why should we expect a moratorium to produce a better, more fair or more accurate, capital punishment system than we already have? More pointedly, what good will a moratorium do for defendants already on death row? Why suspend *their* sentences, if only *future* changes in the system are anticipated? Without persuasive answers to these questions, responsible advocacy of a moratorium (as opposed to abolition) is impossible, and the call for a moratorium becomes empty, even if increasingly politically correct, rhetoric.

Current advocacy for death penalty moratoria is remarkably devoid of substantive answers as to what positive action will occur during a moratorium. "The system," they proclaim, "is shot through with problems: actually innocent defendants, race bias, prosecutorial unfairness and arbitrary disparity."[6] But unless something is to be done to cure such problems (as-

4. 517 U.S. 456 (1996); *see infra* text accompanying notes 21, 23 (discussing *Armstrong*).

5. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1469 (1986).

6. This is a bare bones summary, not just of Mr. Tabak's article, Ronald Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733 (2001), but also of the American Bar Association's Section of Individual Rights and Responsibilities' January 2000 report, *A Gathering Momentum: Continuing*

suming they exist) during a period of moratorium, it is nothing more than a cynical tactic to base the call for suspension on them. That is, unless advocates have a plan to investigate innocence, bias, unfairness, and disparity during any moratorium, *and* to offer achievable solutions, then a moratorium will do no good.

"Moratorium," of course, is a lawyer's word for stopping the criminal justice system before its sentence is carried out. It forbids carrying out the statutorily-authorized penalty, one that has been sought and imposed via legislatively and court approved processes and then recommended by a unanimous jury of men and women drawn from the community. A federal death penalty moratorium would be imposed on cases that have already been subjected to high level executive review—the Attorney General personally approves all federal capital prosecutions—as well as two rounds of independent judicial review by federal courts.

Even putting aside system-interference as an objection, a moratorium is not cost-free. It is not the simple palliative for our collective guilt about having a death penalty that advocates suggest. A moratorium will have real, negative effects on some. Interests of finality, victims desiring closure, and our democratically chosen and designed system of criminal justice, all suffer from an unfocused suspension of the lawful penalty. Indeed, holding out false hopes to occupants of death row—"we'll suspend executions for awhile but then we'll begin again, and nothing that occurs during the moratorium will help you"—is cruel to defendants as well as victims. A moratorium would deny whatever psychological closure and retributive equalization that some victims and communities say they draw from capital punishment. And it would further increase cynicism about a legal system so technicality-heavy that it cannot finally resolve anything.

It is for these reasons that interference in our democratically designed criminal justice system for "further study," in addition to the layers of careful judicial review already available in federal capital cases, ought not be endorsed without some substantive justification. That is, what benefit, what gain, what perceivable increase in justice do we hope to produce by a moratorium? Advocating a temporary suspension of capital punishment, without a detailed plan for study and a realistic hope of reform, seems cynical at best. Delay just for the sake of delay is a position that can be embraced only by pure abolitionists.

So the question is, just what will happen during the period of "temporary suspension" to improve the capital punishment system? The ABA's position on this question—of which I take Roland Tabak's article to be representative, as he is Co-chair of the ABA's Death Penalty Committee, despite the modesty of his "does not necessarily reflect" first footnote—is

---

Impacts of the American Bar Association Call for a Moratorium on Executions, *available at* http://www.abanet.org/irr/report.html (last visited Feb. 20, 2001).

remarkably unsubstantive and undetailed. Indeed, Mr. Tabak candidly says that "[a]s for what should happen after" a moratorium is announced, we "need not agree on every issue now—or even later."[7] The question, Mr. Tabak explains, "about what to do *after* moratoria . . . are declared . . . is a question for the future."[8]

I find it impossible to join a moratorium movement that is founded on such an empty rationale. "Act now, think later" is not a responsible rationale for governmental policy. Only abolitionists—for whom, of course, merely "Justice delayed is Justice"—can be satisfied with this position. But for the 60% or more of Americans who still support some availability of capital punishment, even after "actual innocence" cases are taken into account,[9] some definite plan, some *realistic* hope of progress and results, is necessary before signing on to the moratorium movement.

And even then, the question of why non-minority, unarguably guilty, death row defendants should have their penalties suspended, merely to await studies of innocence and race disparities that will be inapplicable to them, passes silently without explanation.

As Mr. Tabak's article demonstrates, major stimuli driving current calls for a death penalty moratorium are (1) recently demonstrated claims of actually-innocent defendants on death row, largely by DNA testing,[10] and (2) a desire to see the death penalty entirely abolished. As I detail below however, the first rationale appears to have no application to the federal system: there are no plausible "actually innocent" claims on federal death row.

The second motivation is simply cynical: it invites support for a temporary suspension of capital punishment as a masquerade, or facade, to disguise further advocacy for total abolition. But the word "moratorium" promises *re-engagement* of capital punishment, after some type of study or review. A "moratorium" for study of the death penalty presumes that capital punishment, at least for some categories of heinous cases and perhaps with improved procedures, will begin again. The abolitionist rationale does not admit this eventuality. Calling for one result while actually advo-

---

7. Tabak, *supra* note 6, at 754.

8. *Id.* At 755.

9. *See* Henry Weinstein, *Support For Executions Declines*, L.A. TIMES, Sept. 15, 2000, at A1, at LEXIS, News Library, Lat File. (reporting that 60% of those polled still support capital punishment despite concerns about its fairness). A similar Gallup poll last year showed support at 66%. *Id.*

10. Of course not all, or even a majority of, "actually innocent" capital defendants have been released due to DNA. *See* DEATH PENALTY INFO. CTR., INNOCENT: FREED FROM DEATH ROW, *at* http://www.deathpenaltyinfo.org/innocentlist.html (last visited March 13, 2001) (claiming that DNA played a substantial role in only ten of ninety-five cases since 1973). But it certainly is the use of DNA testing to prove innocence that has captured the public's attention in the past few years. *See, e.g.*, Craig Timberg, *DNA Spurs Change in Va.; Crime Panel Debates Evidence, New Trials*, WASH. POST, Dec. 2, 2000, at B1; Editorial, *The New Death Penalty Politics*, N.Y. TIMES, June 7, 2000, at A30 ("The advent of modern DNA technology . . . has heightened public concern . . . causing a dramatic shift in the nation's debate over capital punishment.").

cating another is simply dishonest.

II. A FOCUS ON THE FEDERAL SYTEM

This Essay, asking "*Why* a moratorium?," focuses on the federal capital punishment system. Federal death row currently provides an interesting area of study for a number of reasons. First, there are only twenty people currently on federal death row, a small pool that can be individually examined.[11] Second, the federal capital punishment system has been fully operational in modern, post-*Furman*, times only since 1994,[12] making its operations and results manageable for study. Third, the federal statutory regime provides an amalgamation of procedures from the "best" versions of various state capital punishment statutes, and thus is at least as fair as any other capital punishment system in the country.[13] Thus the federal system presents a more easily studied microcosm of the "best" (if that concept may be applied in this context) of American capital punishment regimes.

As discussed below, the federal system does not appear to be subject to many of the ills that may plague some state systems. Most significantly, there appear to be no "actually innocent" defendants on federal death row.[14] Very competent counsel are appointed in every federal capital case,

---

11. *See* DEATH PENALTY INFO. CTR., *supra* note 2. Twenty-seven federal death penalties have been imposed since the penalty was reauthorized by federal statute in 1988. *Id.* However, one defendant (McCullah) was resentenced to life after the 10th Circuit vacated his death sentence; another five federal defendants once sentenced to death are now awaiting retrial or resentencing after their original death sentences were vacated. *Id.* Finally, on his last day in office, President Clinton commuted David Ronald Chandler's death sentence to life imprisonment. *Id.* Chandler was the only person on federal death row with a serious claim of innocence, at least as to having committed a death-eligible murder. *See* Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 567-69 (2000) (discussing the *Chandler* case) [hereinafter Little, *Future*].

12. After *Furman v. Georgia*, 408 U.S. 238 (1972), declared all existing capital punishment schemes unconstitutional, Congress did not enact a new statute meeting the criteria set forth in *Gregg v. Georgia*, 428 U.S. 153 (1976), until 1988, and this was only for a single, infrequently used charge, 21 U.S.C. § 848 (1994). Congress did not make capital punishment available for a large number of federal offenses until the Federal Death Penalty Act (FDPA) of 1994. *See* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60002(a), 108 Stat. 1796, 1959-82 (codified at 18 U.S.C. §§ 3591-3599 (1994)). *See generally* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 372-388 (1999) (describing case and legislative developments from *Furman* to the 1994 FDPA) [hereinafter Little, *History*].

13. *See* Little, *History*, *supra* note 12, at 388-406 (detailing the mechanics of the federal death penalty statute).

14. *See* discussion *infra* Part III. A lone exception to this claim, David Ronald Chandler, had his sentence commuted to life by President Clinton on January 20, 2001. DEATH PENALTY INFO. CTR, *supra* note 2; Bill Rankin, *Pardon of Alabama Man Draws Hope, Criticism*, ATLANTA J.-CONST., Jan. 22, 2001, at 5A, *at* LEXIS, News Library, Atljnl File. Chandler's case was one of the earliest cases tried to verdict under the 1988 act, before reliable mechanisms to ensure uniformly competent counsel were in place for the federal system. Yet ultimately he was removed from death row; thus his case

and full and fair federal judicial review and habeas corpus are readily available, so that significant legal errors are noticed and corrected. Indeed, fully three of the four bases for death penalty moratoria proposed by the American Bar Association in 1997 are already fulfilled in the federal system.[15] Thus the call for moratoria that has been heard, and even granted, in some states[16] has far less, if any, applicability for the federal system.

Nevertheless, despite Attorney General Janet Reno's institution of a race-blind review system within Main Justice in Washington, D.C. for all potential federal capital cases in early 1995,[17] statistical race disparity persists in federal capital punishment results, just as it does (to varying degrees) in state death penalty statistics. Moreover, the federal death penalty appears to have been sought disparately—some would say arbitrarily—among the various federal geographic districts in the country.[18] Both of these concerns—race and geographic disparity—are worthy of further discussion and study.[19]

But unless moratorium advocates have a realistic plan to obtain overrulings of *McCleskey v. Kemp*[20] and *United States v. Armstrong*,[21] it is difficult to imagine how a moratorium on the execution of clearly *non-innocent* capital defendants can lead to any remedial good. *McCleskey* held that statistical race disparities are constitutionally insufficient to preclude executions.[22] *Armstrong* strongly supported, even in the face of a

---

provides support for my claim that the federal system works. For a discussion of the Chandler case and his "actual penalty innocence" claim, see Little, *Future*, *supra* note 11, at 567-69.

15. The 1997 ABA Death Penalty Moratorium Resolution called for jurisdictions "not to carry out the death penalty" until four areas of concern were adequately addressed: (1) competent counsel; (2) independent federal judicial review; (3) racial disparities (by defendant or by victim); and (4) execution of the mentally retarded or juvenile murderers. ABA, REPORT WITH RECOMMENDATIONS NO. 107, (Feb. 3, 1997), *at* www.abanet.org/irr/rec107.html (Feb. 3, 1997). As explained below, numbers 1, 2 and 4 are already well-addressed by the federal capital punishment regime. *See, e.g.*, *infra* notes 74, 77.

16. Illinois currently has a moratorium in force, and Nebraska is operating under a "*de facto* moratorium," after its legislature passed such a measure only to have it vetoed by the Governor in 1997. *See* Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV. 517, 527 (2000); Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure"; Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1, *at* LEXIS, News Library, Chtrib File.

17. *See* Little, *History*, *supra* note 12, at 411-412 (describing the race-blind DOJ review system). By contrast, a case cannot be "race-blind" at its initial prosecutive stages, so "in the field" in U.S. Attorneys' offices, the federal system is not race-blind.

18. *See* Little, *Future*, *supra* note 11, at 560-562 (noting "unexplained geographic differences," across the country as well as *within* some states); Little, *History*, *supra* 12, at 450-472 (detailing geographic disparity and its possible causes).

19. *See* Little, *Future*, *supra* note 11, at 562; Little, *History*, *supra* note 12, at 472-76, 489-90 (proposing racial and geographic disparity studies).

20. 481 U.S. 279 (1987).

21. 517 U.S. 456 (1996).

22. *See McCleskey*, 481 U.S. at 312-13 ("[T]he Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . [W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias . . . ."). I and many others have criticized *McCleskey*, particularly since Professor David

compelling race-disparity claim, the broad and largely non-reviewable prosecutorial discretion that our criminal justice system has historically endorsed (with, I think, good reason).[23] As long as *McCleskey* and *Armstrong* remain law, one can thoroughly study statistical disparities flowing from race and prosecutorial discretion until, as they say, the cows come home. But unless a "smoking gun" demonstrating intentional, improper bias is found—and my belief is that existing channels of relief would expose such a fact if it existed in a federal case—a moratorium will never provide relief for guilty defendants on death row.

This last point needs to be bluntly understood. It might well be that further study will result in beneficial improvements for *future* capital cases.[24] But unless such improvements would somehow *retroactively* vacate existing capital sentences—a result not suggested even by the ABA's own moratorium resolution—then a *moratorium* on existing capital sentences is illogical and unnecessary.[25]

In September 2000, the U.S. Department of Justice issued a lengthy survey of data on potential federal capital cases since 1988, further demonstrating racial and geographic disparity.[26] Yet neither the Attorney General (who has said she is personally opposed to the death penalty) nor her Deputy Attorney General Eric Holder (who happens to be African-American) stated that this "Disparity Survey" required a moratorium on existing fed-

---

Baldus's sophisticated statistical regression analysis tends to show a *causal* relationship between race and death sentences, not just statistical disparity. *See* Little, *History*, *supra* note 12, at 482-83 (citing other *McCleskey* critics).

23. *E.g.*, 517 U.S. at 464, 468, 459 (despite evidence that every defendant in "every one of the 24 major narcotics cases" closed by a federal defender's office in a year "was black," the evidence was insufficient to gain further discovery from the government, in light of the "rigorous standard" required to overcome the "presumption of regularity" regarding the exercise of prosecutorial discretion). *Accord* Wayte v. United States, 470 U.S. 598, 607 (1985); *see also McCleskey*, 481 U.S. at 296, 311-12 (relying in part on prosecutorial discretion to reject McCleskey's claims).

24. *See, e.g.*, Jo Thomas, *Illinois Supreme Court Issues Rules For Handling Capital Cases*, N.Y. TIMES, Jan. 24, 2001, at A13 (describing new rules issued by the Illinois Supreme Court for the handling of death penalty cases).

25. I recognize that my argument applies primarily to judicial relief, and that a possibility of legislative or executive relief is not foreclosed by *McCleskey* or *Armstrong*. That is, the President might, through his pardon powers, have the authority to stop all further federal executions, even if they complied with existing legal rules. Perhaps the executive even *should* do this, if he were convinced that the existing rules or results were morally wrong or unconstitutional. Congress, too, might be able to grant relief via new statutes, even if existing legal rules were not violated but Congress was displeased with the present state of affairs. Thus it is not theoretically impossible that a moratorium could do some good for current federal death row defendants, and I think these possibilities of non-judicial relief pose interesting questions of constitutional doctrine as well as moral and administrative theory. However, once again the pragmatist in me takes over: there is no indication that the current Congress or President (or their predecessors) would be inclined to so act.

26. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000), *available at* www.usdoj.gov/dag/pubdoc/dpsurvey.html (Sept. 12, 2000) [hereinafter DOJ SURVEY]. This survey reaffirmed the statistical disparities that I demonstrated in my March 1999 *History* article, *supra* note 12.

eral death penalties.[27]

Similarly, in the waning days of the Clinton Administration, an amalgamation of legal and Hollywood celebrities petitioned the President to declare a moratorium on federal executions.[28] While no federal execution had occurred for thirty-seven years, one was scheduled for December 2000. Yet although President Clinton did postpone the first federal execution until 2001, he did not declare a moratorium.[29]

Thus prominent Democrats (the party more likely to be sympathetic to moratorium calls) have said that they have not yet seen justification for a federal death penalty moratorium.[30] This reaction is not based on a lack of sympathy with moratorium advocates, but rather on a realistic assessment of "What good will it do?" What is the rationale for a moratorium on *existing*, and legally secure, sentences imposed on unarguably guilty defendants? So far, answers to these questions have been inadequate with regard to the federal system.

I am all for further study, and indeed elimination, of embedded racial disparity and unfair prosecutorial decisions.[31] But America's elected representatives, and indeed the American people, continue to support the availability of capital punishment. In the federal system, fair, cross-sectional jurors choose unanimously to impose the death penalty in individual cases, under procedures that are more fair than those required under current Supreme Court jurisprudence. In response, moratorium advocates currently provide only empty or cynically disingenuous answers to the "why" question. But it needs to be demonstrated that a moratorium will do some "good," defined as weeding out the actually innocent and eliminating racial bias and unfair disparities. And even then, a moratorium that delays the penalty for *unarguably guilty* and *fairly convicted* murderers is unsupportable. How a moratorium will help those already on death row, unless it

---

27. *See* Marc Lacey & David Johnston, *Clinton Again Delays Execution of a Murderer*, N.Y. TIMES, Dec. 8, 2000, at A24 (reporting that Attorney General Reno said that "I have not seen the basis for supporting [a moratorium] thus far") [hereinafter Lacey & Johnston, *Clinton*]; Marc Lacey & Raymond Bonner, *Reno Troubled By Death Penalty Statistics*, NY TIMES, Sept. 13, 2000, at A17 (noting that Holder said he was "personally and professionally disturbed" but he did not endorse a moratorium) [hereinafter Lacey & Bonner, *Reno*]. "Disparity Survey" is my shorthand, not the Department of Justice's.

28. Letter to President Clinton, *available at* http://www.federalmoratorium.org/CMFELetterto President.htm (Nov. 20, 2000) (letter signed by, *inter alia*, Barbara Streisand, Jack Lemmon, and Norman Lear) [hereinafter Letter to President Clinton].

29. *See* Lacey & Johnston, *Clinton*, *supra* note 27 (while staying Juan Raul Garza's execution until June 2001 and directing the Department of Justice to complete a review of racial and geographic disparity by April 2001, President Clinton said he had not "decided to halt all executions in the federal system").

30. *See supra* notes 27, 29; Sara Rimer, *Support for a Moratorium in Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, at A18 (noting that presidential candidate Gore says no federal moratorium is needed "at this time").

31. *See* Little, *History*, *supra* note 12, at 489-90 (advocating such studies in 1999, to which the September 2000 DOJ SURVEY, *supra* note 26, can be seen as responsive).

leads to abolition, is unexplained.

If "moratorium" is actually disguised abolition, then let the ABA and others so identify it openly and not try to fool the general public.[32] If it is not, then how will it provide relief for those whose executions are only temporarily suspended? So far, moratorium advocates have not made, or even attempted, a showing as to "why" a moratorium will cure the ills they disclaim. At the federal level, at least, justification for a moratorium has not been shown.

III. WHY THE FEDERAL SYSTEM IS DIFFERENT IN GENERAL

Successful calls for death penalty moratoria have all been made at the state, not federal, level.[33] This is unsurprising for a number of reasons. First, the overwhelming bulk of capital punishment is prosecuted and carried out at the state level. Since *Furman* and *Gregg* through the end of 2000, states have executed 683 people and another 3,507 are currently incarcerated on state death rows.[34] By contrast, as of February 8, 2001, only twenty people are on federal death row, and a federal execution has not been carried out since 1963.[35]

Not only are the huge majority of American death row prisoners convicted at the state level, but to the extent that calls for a death penalty moratorium are based on fears that there are "actually innocent" defendants on death row, the federal system is generally free of such concern.[36] Possible reasons for this are many. All federal capital defendants are guaranteed two experienced lawyers, one of whom must be "learned" specifically in capital cases.[37] They are also entitled to investigators and other necessary

32. While I understand the argument that the perceived immorality of capital punishment justifies all argument tactics, even disingenuous ones, I do not accept it.

33. *See supra* note 16.

34. Tracy L. Snell, *Capital Punishment 1999*, BUREAU OF JUST. STATS. BULL., Dec. 2000, at 1, 12, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp99.pdf.

35. DEATH PENALTY INFO. CTR, *supra* note 2; Little, *History*, *supra* note 12, at 355.

36. *See infra* Part IV (discussing all twenty of the defendants currently on federal death row).

37. 18 U.S.C. § 3005 provides that "2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases" must be "promptly" appointed upon a federal capital defendant's request. The requirement of learnedness in capital cases was added in 1994. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60026, 108 Stat. 1796, 1982 (1994). The right to two government-paid lawyers, however, has been guaranteed to federal defendants since 1790. *See* 1 Stat. 118, chap. IX, sec. 29 (1790).

In fact, three extremely talented lawyers are currently federally funded to find competent counsel and coordinate defense efforts for all federal capital cases around the county. Associated as the "Federal Death Penalty Resource Counsel" group, David Bruck, Richard Burr, and Kevin McNally do an excellent job in this regard. *See* Federal Death Penalty Resource Counsel, *Who We Are*, *available at* http://www.capdefnet.org/fdprc_gateway.htm (last visited March 29, 2001).

services.[38] Therefore, truly ineffective capital case assistance is rare at the federal level.[39] In addition, for many reasons—including because they have freedom to decline virtually any capital prosecution in favor of a state homicide prosecution, a luxury of declination resulting from our federalist system that state prosecutors generally do not have—federal prosecutors can be more selective in their case selection. As non-elected officials, federal prosecutors may be less subject to community pressures to pursue questionable cases. Not surprisingly, they tend to select the "better" (more clearly guilty, more heinous facts, less equivocal evidence) capital cases.

Thus federal officials, whether Democrat or Republican, have not supported calls for a federal death penalty moratorium. "No evidence to justify it" has been the common refrain.[40] Indeed, there are unarguably guilty multiple-victim murderers on federal death row—Timothy McVeigh (168 people killed in the Oklahoma City Federal Building bombing), and Richard Tipton, Cory Johnson and James Roane (at least nine murders in furtherance of a gang-run cocaine trafficking conspiracy)—and cold-blooded killers who still kill even though they already have been imprisoned for life (Anthony Battle, David Hammer).[41] For defendants like these, the question "Why should we wait?" cannot be ignored. It must be answered, and the answer must be by reference to these specific cases, not by adverting to mythical innocent defendants who are simply not present in the federal system.

IV. SPECIFICS: THERE ARE NO "ACTUALLY INNOCENT" DEFENDANTS ON FEDERAL DEATH ROW

The primary rationale for death penalty moratoria—actual innocence—has recently been supported by numbers of DNA-supported and other innocence releases from death row.[42] Of course we should execute no one who actually seems to be innocent of the crime (or, for that matter, "innocent" of the penalty).[43] Who can argue with this? We should always sup-

38. 21 U.S.C. § 848(q)(9) (1994). While this provision technically applies only to capital indictments under 21 U.S.C. § 848, it has been the practice of the U.S. Department of Justice to permit its application in all federal capital cases.

39. It is important to note that government-paid counsel and other services are also statutorily available, in a federal court's discretion, for *state* capital defendants who are pursuing relief via federal habeas corpus. *See* 18 U.S.C. § 3006A(a) (1994); *see, e.g.*, Simmons v. Lockhart, 931 F.2d 1226, 1227 (8th Cir. 1991).

40. *See supra* notes 27, 29, 30.

41. *See infra* Part IV (examining these and other death penalty cases in more detail).

42. *See supra* note 10; *see generally* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

43. "Penalty innocence" recognizes that, under every post-*Gregg* statutory scheme, even a convicted homicide defendant cannot be sentenced to death unless s/he committed a "death-eligible" offense, with the requisite non-negligent intent, to which one or more statutory "aggravating" factors

port a stay of execution while capital cases are carefully examined for a determination of plausible claims of innocence.

But the "actual innocence" justification has no systemic application—indeed, no demonstrated application at all—to federal death row. Although a number of recent cases are still early in the appellate stage, and thus difficult to evaluate, no current occupant of federal death row plausibly claims to be innocent so far as I am aware. This is, of course, not insignificant.[44] Neither is it surprising. The federal system leading to prosecution for, and conviction of, capital charges is exhaustively protective and thorough in its review. First, federal prosecutors and centralized Main Justice review screen out questionable capital cases. Then the federal system guarantees every defendant *two* competent lawyers, who also ferret out bad cases.[45] Simply put, defendants who are plausibly innocent do not make it to trial, let alone sentencing, in the federal system. Consequently, only twenty people currently reside on federal death row, after over a decade of federal death penalty availability, and *none* claim, or reasonably appear, to be innocent.

Even if an actually innocent federal defendant was somehow convicted and sentenced to death, unrelieved, at trial, at least two opportunities for federal judicial review add another, rigorous screen.[46] First, all federal defendants are entitled to Circuit court review and a petition to the U.S. Supreme Court for certiorari. They then are granted a second round of review in the federal courts via habeas corpus. Such review is far from toothless: at least six federal death penalties have been overturned at some level of federal judicial review since 1988, which is over 20% or one-fifth (six of twenty-six) of all federal death sentences returned.[47]

Finally, the federal pardon process (properly engaged) provides a final

---

applies. *See* 18 U.S.C. §§ 3591(a), 3593(d). Thus a defendant can be guilty of a killing and yet "innocent" of the penalty—that is, statutorily not subject to the death penalty. Because the penalty of death is different in kind from life imprisonment, claims of "penalty innocence" are vitally significant in capital cases. *See* Michael L. Radelet & Hugo Adam Bedau, *ABA's Proposed Moratorium: The Execution of the Innocent*, 61 L. & CONTEMP. PROBS. 105, 109-12 (1998).

44. The "Citizens for a Federal Moratorium" suggest that executing even the guilty, in the face of race and geographic disparity claims, is "unconscionable." Letter to President Clinton, *supra* note 28. But why this is so is unclear and the claim is easily debatable. It also ignores the fact that *McCleskey* and *Armstrong* do not permit the judicial system to recognize the argument. While one might decide to abolish capital punishment even for the guiltiest of murderers, whether defendants are actually guilty of multiple or heinous intentional killings is undoubtedly a central point in evaluating a capital punishment system.

45. *See* 18 U.S.C. § 3005 (1994); *supra* note 37.

46. I say "at least" two because federal trial justices may also exert their own post-verdict authority to grant relief. *See, e.g.*, United States v. Lee, 89 F. Supp. 2d 1017, 1020-21 (E.D. Ark. 2000) (holding that a trial court considering a death sentence "has the authority it would have in any other case to grant the Defendant post-sentencing or post-conviction relief").

47. *See* DEATH PENALTY INFO. CTR., *supra* note 2. None of the reversals have been for innocence. Chandler, who did claim innocence, is not included since he was granted clemency before his final certiorari petition could be reviewed. *See supra* note 2.

screen to prevent injustice. Thus David Ronald Chandler, with a colorable claim of penalty innocence, was removed from federal death row in January 2001.[48]

In short, my assertion is that claims of actual innocence have no justificatory relevance to calls for a *federal* moratorium. With only twenty persons currently under a federal penalty of death, the best way to demonstrate this is to discuss each case individually.

Accordingly, I consider below each of these twenty defendants, grouped together if party to the same crime, in the chronological order in which their death penalties were imposed. My information is drawn solely from published accounts of their cases; the defendants' lawyers, or indeed the Department of Justice, might not agree with my descriptions or characterizations. Finally, as I write this Essay, the six most recent federal death sentences have not yet produced reported judicial decisions, so my brief factual description is taken from newspaper accounts. Conclusions drawn from popular press accounts are, while not totally worthless, worth less than considered judicial review based on independent judicial concentration and the parties' legal advocacy. However, even though "innocence claims" might be lurking in these cases although currently not apparent, they will be evaluated on direct appeal and federal habeas corpus. Even for these six cases, it is important to remember that each defendant has already been found guilty beyond reasonable doubt, after a trial under fair federal procedures and with the aid of the competent counsel that federal law mandates.

1, 2, 3. *Richard Tipton, Cory Johnson, James Roane.*[49] These three defendants were convicted for nine separate murders connected to their major cocaine-trafficking business in the area of Richmond, Virginia.[50] Tipton was convicted for six murders, Johnson for seven, and Roane for three.[51] The jury returned death sentence verdicts on three of Tipton's murders, seven of Johnson's, and one of Roane's.[52] None of the defendants plausibly contest their drug-trafficking charges, nor do they plausibly challenge their active participation in at least one murder. Johnson was unarguably identified as the "actual executioner" in two of the killings, and the Fourth Circuit found Tipton to be an "active participant" in a number of the killings.[53] Roane has contended that his motive for killing Torrick Brown was personal jealousy,[54] which although possibly a claim of "pen-

48. *See supra* note 14.
49. United States v. Tipton, 90 F.3d 861 (4th Cir. 1996), *cert. denied*, 520 U.S. 1253 (1997).
50. *Id.* at 867-68.
51. *Id.* at 869-70.
52. *Id.* at 870.
53. *Id.* at 890.
54. *Id.* at 891.

alty innocence," is not a claim of innocence of murder. The Fourth Circuit has noted that, even accepting Roane's argument, his murder "further[ed] the enterprise's policy . . . of reacting violently to [affronts] and . . . thereby further[ed] the reputation for violence essential to . . . the enterprise's . . . drug trafficking business."[55] There is no plausible claim of actual innocence as to Tipton, Johnson, or Roane.

4. *Juan Raul Garza.*[56] Garza's case has received much attention because, until Timothy McVeigh waived his remaining judicial appeals, Garza's execution date was the closest of all the federal defendants.[57] His direct and collateral appeals have all been rejected,[58] he has filed an extensive clemency petition,[59] and President Clinton twice delayed Garza's execution date.[60] Indeed, as a Latino from Texas, the state with the highest execution rate in the Union, Garza claims to be a victim of both ethnic bias and geographic disparity and his case has become entwined with the Department of Justice's Disparity Survey.[61]

Despite his legal claims, there is no doubt as to Garza's factual guilt. Garza was convicted for directing three murders in connection with his large-scale international drug trafficking operation.[62] At sentencing, he was alleged to have been responsible for four additional, albeit unadjudicated, murders in Mexico.[63] In his ninety-six page clemency petition, he does not claim innocence of the three murders for which he was convicted.[64]

5. *Louis Jones.*[65] As the first federal death penalty case to be heard by the Supreme Court in fifty years, Jones' case has also received substantial attention. I have described elsewhere why I think the Supreme Court "got it wrong" in *Jones*: the process under which his death penalty was imposed (in the first capital case tried to verdict under the 1994 Act), was shot

55. *Id.*

56. United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996).

57. *See* Little, *Future*, *supra* note 11, at 530-31 (discussing Garza's case); *see also* discussion *supra* note 14. For a discussion of McVeigh's case and execution, see *infra* notes 78-82.

58. Little, *Future*, *supra* note 11, at 531.

59. Memorandum in Support of Petition for Clemency and for Commutation of Sentence of Death to Sentence of Life Imprisonment without Possibility of Release, *In Re* Juan Raul Garza (Sept. 28, 2000) (on file with author) [hereinafter Memorandum in Support of Clemency].

60. Lacy & Johnston, *Clinton*, *supra* note 27.

61. *Id.* In announcing the stay of Garza's execution, President Clinton said, "I am not satisfied that, given the uncertainty that exists [as recognized in the *DOJ Survey*], it is appropriate to go forward with an execution in a case that may implicate the very issues at the center" of the *DOJ Survey*. *Id*; *see also* discussion *infra* Part V.

62. United States v. Flores, 63 F.3d 1342, 1367 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996).

63. *Id.* at 1367; Memorandum in Support of Clemency, *supra* note 59, at 57.

64. *See* Memorandum in Support of Clemency, *supra* note 59.

65. Jones v. United States, 527 U.S. 373 (1999).

through with error, and the Supreme Court's "harmless error" rationale plainly violates the federal statute.[66] His case is currently on habeas corpus review, and these procedural errors may yet be corrected. Still, there is no doubt regarding Jones' commission of a brutal kidnapping, rape and murder of a female army private.[67] He confessed,[68] and even Justice Ginsberg noted Jones' "atrocious" crime in her dissent.[69]

6, 7. *Orlando Hall*[70] and *Bruce Webster*.[71] These defendants were tried and sentenced to death separately, for the brutal kidnapping, rape and murder of a sixteen-year-old girl connected to the defendants' drug trafficking.[72] Hall admitted the offense,[73] and neither of the defendants' lengthy appeals contested their guilt.[74]

8. *Anthony Battle*.[75] Battle was serving a sentence for life imprisonment for a previous federal murder when he murdered a federal prison guard by pummeling the guard to death with a hammer in an open cell block.[76] Although Battle has a history of psychiatric problems, the facts of his crime are not contested.[77]

9. *Timothy McVeigh*.[78] The facts of the Oklahoma City Federal Building bombing are well-known. One hundred and sixty-eight people were

66. *See* Little, *Future*, *supra* note 11, at 545-53. By ruling that the government's closing argument at sentencing "cured" the due process error of relying on duplicative non-statutory aggravating factors, the Court violated the Federal Death Penalty Act's requirement of *advance* notice for aggravating factors. *See* 18 U.S.C. § 3593(a) (1994); *Jones*, 527 U.S. at 399.

67. *See Jones*, 527 U.S. at 376.

68. United States v. Jones, 132 F.3d 232, 237 (5th Cir. 1998).

69. *Jones*, 527 U.S. at 408 (Ginsberg, J., dissenting).

70. United States v. Hall, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 526 U.S. 1117 (1999).

71. United States v. Webster, 162 F.3d 308 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999).

72. *Hall*, 152 F.3d at 389-90; *Webster*, 162 F.3d at 318-19.

73. *Hall*, 152 F.3d at 390, 391 n.1.

74. While not contesting his guilt, Webster apparently does contend that he is mentally retarded, and four jurors in his case found that he "is or may be," although the judge expressly found to the contrary. *Webster*, 162 F.3d at 351-53. Because a federal death sentence "shall not be carried out upon a person who is mentally retarded," this issue must be resolved with certainty before Webster's death sentence may be carried out. 18 U.S.C. § 3596(c) (1994).

75. United States v. Battle, 979 F. Supp. 1442 (N.D. Ga. 1997), *aff'd*, 173 F.3d 1343 (11th Cir. 1999), *cert. denied*, 529 U.S. 1022 (2000).

76. *Id.* at 1445; *see* 18 U.S.C. § 1118(a) (authorizing the death penalty for prisoners sentenced to life imprisonment who commit murder while in prison).

77. *See Battle*, 979 F. Supp. at 1469 (describing how Battle admitted to the killing at trial). Battle does have some history of psychological problems, although his insanity defense was rejected at trial. *Id.* Because 18 U.S.C. § 3596(c) prohibits carrying out a death sentence "upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed," Battle's mental capacity will have to be resolved with certainty before he can be executed. 18 U.S.C. § 3596(c). *See supra* note 74 (similar point regarding mental retardation).

78. United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998).

killed in the attack.[79] There is no doubt regarding McVeigh's guilt,[80] and he recently referred to the children killed as "collateral damage."[81] McVeigh has now petitioned to drop all further legal challenges, and barring unforeseen developments, his execution on May 16, 2001 will be the first federal execution since 1963.[82]

10. *Jeffrey Paul.*[83] Paul was convicted of beating an elderly man to death, with a co-actor, during a robbery on national parkland.[84] The decision to prosecute this garden-variety (relatively speaking) robbery-murder as a federal capital case does raise, for me, significant jurisdictional and case-disparity concerns. That is, why should this particular robbery-murder result in a death sentence, when so many other similar cases do not?[85]

In addition, the fact that Paul's co-killer received life rather than a death sentence (albeit from a different jury) raises questions about equality of treatment.[86] Yet diverse jury decisions must be accepted if we are to have a jury system at all.[87]

Nevertheless, these concerns do not go to "innocence" under even a broad interpretation, and there is no serious dispute that Paul committed the crime. Four witnesses testified that Paul had admitted the crime to them,[88] and his appeal suggests no issue of innocence.[89]

11. *Darryl Johnson.*[90] Johnson was convicted of murdering two fellow gang members who he felt were informers on the Gangster Disciples'

---

79. *Id.* at 1176.

80. *See id.* at 1191 (affirming the exclusion of "alternative perpetrator evidence" because it was simply "unsupported speculation").

81. Jo Thomas, *'No Sympathy' for Dead Children, McVeigh Says*, N.Y. TIMES, Mar. 29, 2001, at A12.

82. Nolan Clay, *McVeigh Allows Clemency Deadline to Pass*, DAILY OKLAHOMAN, Feb. 16, 2001, *at* LEXIS, News Library, Dlyokn File. McVeigh has stated that he wants his execution televised. Nolan Clay, *McVeigh Suggests Televised Execution*, SUNDAY OKLAHOMAN, Feb. 11, 2001, *at* LEXIS, News Library, Dlyokn File. The irony of Timothy McVeigh "volunteering" to provide the federal government with the best possible case for its first execution in two generations, thereby serving the interests of the same government McVeigh professes to hate, should not be lost on capital punishment observers.

83. United States v. Paul, 217 F.3d 989 (8th Cir. 2000).

84. *Id.* at 994.

85. *See* Little, *History*, *supra* note 12, at 490, 499-500 & n.686 (discussing this concern and "the inevitable manipulability of language" whenever the dispositive aggravating factor is the allegedly "heinous" character of the killing, as it was in Paul's case).

86. *See Paul*, 217 F.3d at 995.

87. *See* United States v. Powell, 469 U.S. 57, 65 (1984) (inconsistent jury verdicts are not ground for reversal); *McCleskey*, 481 U.S. at 311-12, 319.

88. *Paul*, 217 F.3d at 994-95.

89. *See generally id.*

90. United States v. Johnson, 223 F.3d 665 (7th Cir. 2000).

drug trafficking activities.[91] As the Seventh Circuit noted, "[h]e does not deny having committed the two murders."[92]

12, 13. *Billie Allen and Norris Holder.* These defendants fatally shot a bank guard during a robbery using semiautomatic SKS rifles.[93] While the defendants argued they did not intend to kill—some bullets ricochetted off the floor before hitting the guard—they did not contest that they fired shots or committed the armed robbery.[94]

14. *David Paul Hammer.*[95] Hammer strangled another inmate to death in the federal prison where he had been sent to serve a 1,200-year Oklahoma state sentence for various felonies.[96] Midway through his trial he pled guilty, admitting the conduct.[97] He has since gained notoriety by vacillating as to whether or not he wishes to continue his appeals, causing the courts to set and then vacate at least one execution date.[98] There is no innocence claim here,[99] although Hammer has some history of mental problems and his mental capacity will have to be ascertained before he may be executed.[100]

15. *Richard Stitt.* Stitt was convicted of ordering the murders of three persons as the leader of a large-scale narcotics conspiracy.[101] He apparently *does* contend that he is innocent, and that fellow drug dealers lied at trial to garner deals for themselves.[102] The plausibility of this claim will have to be tested in Stitt's direct appeal and certain-to-follow habeas corpus proceedings. But the mere fact that one federal defendant claims innocence is no reason for a broad moratorium.

16, 17. *German Sinisterra and Arboleda Ortiz.* These defendants are both Columbian nationals, convicted of a murder in furtherance of their

---

91. *Id.* at 667.

92. *Id.*

93. Tim Bryant, *Man is Guilty of Robbing Bank, Murdering Guard*, ST. LOUIS POST-DISPATCH, Feb. 27, 1998, at B1, *at* LEXIS, News Library, Slpd File.

94. *Id.* While this is a sort of "penalty innocence" argument, *see supra* note 43, it is an issue that is incapable of direct or dispositive proof, and thus the jury's resolution must be accepted as final if we are to retain a jury system at all.

95. United States v. Hammer, 25 F. Supp. 2d 518 (M.D. Pa. 1998).

96. *See id.* at 525.

97. *Id.* at 520.

98. *See* United States v. Hammer, 239 F.3d 302, 303-04 (3d Cir. 2001) (Nygaard, J., opinion sur denial of rehearing *en banc*).

99. *See Hammer*, 25 F. Supp. 2d at 520.

100. *See id.* at 521; *supra* notes 74 & 77.

101. Lynn Waltz, *Drug Lord Sentenced to Die*, VIRGINIAN-PILOT, Nov. 6, 1998, at A1, *at* LEXIS, News Library, Vapilt File. His co-defendant's appeals, however, have been affirmed on appeal.

102. *See id.*

narcotics conspiracy.[103] Apparently neither man contested involvement in the narcotics conspiracy or killing, although both claimed to be mere "mules" acting at the command of, and in fear of, a third Columbian who avoided apprehension.[104]

18, 19. *Christopher Vialva and Brandon Bernard.* The defendants, along with four juveniles, kidnapped and murdered a couple visiting Texas from Iowa.[105] The federal car-jacking statute[106] may have provided the only federal jurisdiction over this case—a questionable jurisdictional choice, perhaps, but not an innocence claim. It is too early to evaluate any "innocence" claims, but Vialva is reported to have said, immediately after his death sentence was imposed, that "two wrongs don't make a right," possibly indicating no contest on the facts.[107]

20. *Dustin John Higgs.* Higgs, a convicted drug dealer, allegedly ordered the execution of three women.[108] A co-defendant, Willis Haynes, did not dispute being the triggerman and was sentenced to life after a separate trial.[109] Thus, Higgs has an "equality of treatment claim" similar to Jeffrey Paul's, although Higgs allegedly ordered Haynes to commit the murder,[110] a possibly aggravating fact not present in Paul's case. Nonetheless, Higgs apparently has not conceded his guilt[111] and it is too early to evaluate the plausibility of any innocence claims.

V. SHOULD RACE DISPARITY STATISTICS CAUSE A FEDERAL MORATORIUM?

The foregoing demonstrates that actual innocence is not a systemic concern in the federal system and thus cannot justify a federal moratorium. There is, however, another basis for calling for a federal moratorium: the persistent racial disparities that plague the federal, as well as the state, capital punishment system. In 1999, I detailed the statistical basis for say-

103. Mark Morris, *Jury Convicts Three in Drug-Related Killing*, KANSAS CITY STAR, Apr. 28, 2000, at B2, *at* LEXIS, News Library, Kcstar File.

104. Ruth E. Igoe, *Jury Told of Drug Slaying*, KANSAS CITY STAR, Apr. 18, 2000, at B3, *at* LEXIS, News Library, Kcstar File.

105. *Two Men Sentenced to Death for Killing Couple at Fort Hood*, AMARILLO GLOBE-NEWS, June 14, 2000, *at* http://www.amarillonet.com/stories/061400/tex_LD0756.shtml.

106. 18 U.S.C. § 2119 (1994).

107. *Two Men Sentenced to Death for Killing Couple at Fort Hood*, *supra* note 105.

108. Reuben Castenada, *Second Man Convicted of '96 Triple Slaying*, WASH. POST, Oct. 12, 2000, at B2.

109. *Id.*

110. *Id.*

111. *Id.*

ing that race disparity infects the federal system, and offered some suggestions for change and further study.[112] In September 2000, the Reno Justice Department released its own detailed statistical data for the last twelve years, further demonstrating the racial disparity in the federal system.[113] The Department's statistical data, all 355 pages of it, was largely a "data dump," offering no particular suggestions for future study or action. Nevertheless, it is wonderful public exposure of all the data the Department has, warts and all, and the Department deserves great credit for making it available. One hopes that such "open government" data-sharing will continue in the Justice Department under the new Administration.

The Department's data starkly supports the unfortunate race disparity conclusion that must be drawn with regard to capital punishment generally in this country. Attorney General Reno noted that she was "sorely troubled" by the data, and Deputy Attorney General Eric Holder, himself African-American, stated that he was "both personally and professionally disturbed by the numbers."[114] Since the federal death penalty was reauthorized in 1988, almost 50% of all defendants submitted to the Department for potential death penalty authorization have been African-American, over 80% have been some type of ethnic minority, and only 19% have been White.[115] Yet African-Americans represent less than 13% of the American population, and all minorities make up only 29%, while white Caucasians make up over 71%.[116] Thus, by the time cases are *submitted* by U.S. Attorneys around the country to the Department of Justice for race-blind review, minorities are significantly over-represented in the pool.

Drawing conclusions from culturally-defined race and ethnic data is far from a precise science.[117] Still, taking the Department's data on its own terms, the initial race disparities present in the submission of potential capital cases to the Department is then mirrored throughout the Department's internal review process. That is, of all defendants *approved* for federal

112. *See* Little, *History*, *supra* note 12, at 476-90.

113. DOJ SURVEY, *supra* note 26.

114. Lacy & Bonner, *Reno*, *supra* note 27.

115. Three-hundred and sixty-three of 734 defendants submitted were Black, or 49.4% (141 of 734 defendants were White (19%) and 593 of 734 (80.8%) were Hispanic or other minority). DOJ SURVEY, *supra* note 26, at 9. *But see infra* note 117.

116. *See* U.S. CENSUS BUREAU, POPULATION DIVISION, RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE AND HISPANIC ORIGIN, *available at* http://www.census.gov/population/estimates/nation/intfile3-1.txt (finding 12.8% of the U.S. population is Black, and 71.3% of the U.S. population is comprised of non-Hispanic Whites) (last visited March 29, 2001).

117. For example, the DOJ's report notes an interesting, and not at all insignificant, difficulty in identifying capital defendants by race or ethnicity. The DOJ's data excludes "Hispanics" from its "White" and "Black" categories, tracking "Hispanics" as a separate category. DOJ SURVEY, *supra* note 26, at 6 n.5. However, the U.S. Census Bureau reports that "approximately 91 percent of the Hispanic population would, if described by race, be categorized as 'White,' while approximately six percent would be categorized as 'Black' and approximately three percent would be categorized as 'Other.'" *Id.* at tbl xvi. If "Hispanic Whites" were included in the DOJ's "White" category, then the perceived racial disparities would narrow significantly. *Id.* (noting a White/Black disparity of 20% to 45% if Hispanics were excluded, but an even 46% to 46% split if included).

capital prosecutions between 1988 and 2000, 24.7% were White, while 50.9% were Black and 75.2% were racial or ethnic minorities.[118] By the time these cases actually get to juries (and not all of them do), the apparent disparity worsens: of the twenty defendants sentenced to death and currently on federal death row as of February 8, 2001, three (15%) are white, while fourteen (70%) are black, and seventeen (85%) are a minority of some kind.[119]

As the Attorney General and Deputy Attorney General noted at the time the DOJ Survey was released, the existing data is disturbing.[120] Yet it is far from conclusive. It might, for example, accurately reflect the ethnicity of those committing death-eligible federal murders—we simply do not know and more research is needed. Moreover, statistical "disparity" is not the same as impermissible *bias*.[121] This is precisely what *McCleskey* holds. Individualized proof of *bias* is required for a capital defendant to claim any relief. While *McCleskey* has been heavily criticized, it remains the law. Thus, one respected federal judge has already rejected claims that the DOJ

118. *See id.* at 11 (51 of 206 defendants were White, 105 of 206 were Black, and 155 of 206 were members of minority groups).

119. *See* Death Penalty Information Center, *supra* note 2. The individual distribution is:

WHITE	BLACK		HISPANIC	OTHER
McVeigh	Tipton	D. Johnson	Garza	
Paul	C. Johnson	Allen	Sinistera	
Hammer	Roane	Holder	Ortiz	
	Jones	Stitt		
	Hall	Vialya		
	Webster	Bernard		
	Battle	Higgs		

120. *See supra* note 114. Another disturbing example is that the DOJ statistics show that "47% of all [W]hite defendants for whom the Attorney General authorized seeking the death penalty subsequently [were permitted to enter] into a plea bargain in exchange for a non-death sentence, as compared to only 27% of Hispanic defendants . . . authorized for death." *Letter to President Clinton*, *supra* note 28; *see also* Mike Dorning, *Federal Death Sentences Show Race Gap—More Plea Deals for White Suspects*, CHI. TRI., July 24, 2000, at 1, *at* LEXIS, News Library, Chtrib File. This discrepancy persists because, as I have previously pointed out, while the Attorney General's approval is required to go ahead with a federal capital prosecution, AG approval is *not* required—that is, individual U.S. Attorneys have absolute discretion—to subsequently plead the case for a no-death sentence. Little, *History*, *supra* note 12, at 434; Little, *Future*, *supra* note 11, at 561-62.

121. A non-legal example may best make this point clear. A recent study reports that "[B]lack children are 50 percent less likely to be buckled up [in car seatbelts] than are [W]hite or Hispanic children." *See Black Churches in Memphis Get Seatbelt Grant*, CHATTANOOGA TIMES/FREE PRESS, Feb. 20, 2001, at A2, *at* LEXIS, News Library, Chtms File. One imagines, however, that this disparity hardly shows "bias" on the part of Black children's caretakers, who themselves are likely Black. Of course, the disparity may be the indirect result of other longstanding or cultural biases in America (or it may not). But it certainly does not prove, nor even support a fair inference of, impermissible bias on the part of the actors (here, the should-be seatbelt bucklers).

Disparity Survey requires relief from capital prosecution.[122] Relying directly on *McCleskey* and *Armstrong*, and finding no *individual* racial bias or unconstitutional arbitrariness in the defendants' cases, Judge Leonard Sand denied relief on race as well as geographic disparity grounds. In addition, in an opinion issued before the Disparity Survey was available, the Fifth Circuit rejected a similar claim.[123]

Interestingly, the available data suggests that if race bias *is* infecting the federal capital punishment process, it is not in the Department of Justice's centralized review system. That process, which Attorney General Reno self-consciously set up to be "race-blind"[124] beginning in 1995, does not appear to treat whites better than blacks or other minorities. In fact, the DOJ Review Committee tended to recommend death penalty prosecutions for whites at a *higher* rate than for blacks (39% for whites, 27% for blacks).[125] The Attorney General similarly approved a higher percentage of white defendants than black defendants for capital prosecution (38% for whites, 25% for blacks).[126] Meanwhile, juries returned death verdicts for white and black defendants at roughly the same rate from 1988 to 2000 (43% for whites, 48% for blacks).[127] Thus, if impermissible racial bias exists in the federal system, it seems to arise at the very earliest stages of the cases: non-lawyer investigators and early prosecutorial decisions apparently play the largest role.[128] This is not really a surprise: prosecutorial and investigative discretion has always played an influential role in the American criminal justice system.

There is, however, currently no data that would permit an informative study of this early prosecutorial stage to be made, at least in the federal system. For example, as I explained in 1999, no reliable data regarding declinations of potential capital cases is maintained by the Department of

122. *See* United States v. Bin Laden, 126 F. Supp. 2d 256 (S.D.N.Y. 2000).

123. United States v. Webster, 162 F.3d 308 (5th Cir. 1998).

124. That is, all the reviewers of potential capital cases within the Department are kept ignorant of both the defendant's and victim's race, unless the defendant himself reveals it. DOJ SURVEY, *supra* note 26, at 3; *see* Little, *History*, *supra* note 12, at 411-12 (describing this process). *See also supra* note 17.

125. Of 120 white defendants submitted to DOJ for review by U.S. Attorneys in the years 1995-2000, forty-seven were recommended for capital prosecution, or 39.2%, while of 300 black defendants submitted for review, eighty, or 26.6%, were recommended for capital prosecution. *See* DOJ SURVEY, *supra* note 27, at 19.

126. *See id.* at 26 (44 of 115 white defendants and 71 of 287 black defendants were approved). The numbers do not match because there is some slippage in eligible defendants between the time the Review Committee recommends and the Attorney General reaches a final decision.

127. *See id.* at 32-34 (6 of 14 white defendants, 16 of 33 black defendants).

128. That is, non-lawyer investigative agents often make the first decision whether to seek a federal (as opposed to state) prosecution, and for what crimes and charges. Then line federal prosecutors in the field make decisions on what cases to accept (or to decline in favor of state prosecution), how to charge them (death penalty eligible or not), and how to prosecute them (including whether to recommend a capital prosecution or not). All this occurs before the case gets to Main Justice in Washington, D.C. for review.

Justice. Further study needs to be done, and it is likely to be complex and time-consuming. At the close of the Clinton Administration, the National Institute of Justice held a one-day conference to examine what sort of further research models might be possible and productive.[129] During his confirmation hearings, newly confirmed Attorney General John Ashcroft agreed to continue the federal research efforts in this area.[130] But no research grant "request for proposals" has yet been issued by the National Institute of Justice, and it remains to be seen whether the current Administration will carry on the Department's laudable efforts in this area.

As Professor John McAdams has pointed out, not only does statistical race disparity—overrepresentation of minorities in the death penalty pool when compared to their representation in the general population—not prove impermissible *bias*, but the statistics and cases when carefully examined might support a "level up" remedy rather than a moratorium.[131] Nevertheless, I think statistical race disparity is an important anomaly to be concerned with, and any attempt to pin down its root causes, and eliminate those found to be based on bias, is a worthy object of further study and thought.

But why should such further study and thought also preclude the carrying out of already-imposed death sentences? Here, the call for a general moratorium paints with far too broad a brush. It is illogical. It is also entirely unrealistic given our current legal landscape.

First, to put it bluntly, why should concerns about bias against minorities lead to suspension of death sentences for guilty Caucasian murderers? Timothy McVeigh killed 168 men, women and children, of many different ethnicities. David Hammer, having previously been committed to a "special housing unit" of a federal prison to serve a life sentence for prior violent felonies, strangled another federal prison inmate to death, demonstrating not only moral guilt but dangerousness even while in maximum security prison.[132] Jeffrey Paul and an accomplice beat and kicked an eighty-two-year-old man to death and then shot the victim in the head. These three defendants are white, and juries unanimously decided that death sentences were appropriate for them, after fair process and despite advocacy by competent defense counsel. Even if we are concerned that the system is biased invidiously against minorities, such concern would seem to be irrelevant to these three white defendants. That is, even if further study

129. *See* Letter from Julie E. Samuels, Director of the National Institutes of Justice, to Rory K. Little (Jan. 5, 2001) (on file with author).

130. *See Day II, Morning Session of a Hearing of the Senate Judiciary Committee: Nomination for Attorney General*, 107th Cong., *available at* LEXIS, Legis. Library, Fednew File (Jan. 17, 2000).

131. *See* John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153, 168 (1998); *see also* John C. McAdams, *It's Good and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 826-27 (2001).

132. *See* United States v. Hammer, 25 F. Supp. 2d 518, 519-21 (M.D. Pa. 1998).

would prove impermissible racial *bias* and not simply disparity—an unlikely and possibly impossible prospect—such proof can do McVeigh, Hammer, and Paul no good. What is the rationale for a moratorium that is undifferentiated as to them?

Of course, there may be case-specific reasons why these three defendants should not be executed, although none are apparent regarding McVeigh, and only a possible mental instability claim could save Hammer.[133] Such case-specific concerns, however, will come out in the normal federal judicial review and clemency processes. The point is that a *moratorium* is not justified, and nothing proposed to occur during a moratorium will do these three Caucasian defendants, at least, any good.

Even when we turn to the seventeen minority (Black or Hispanic) defendants on federal death row, it again appears that all the moratorium study in the world cannot change the legal status of their cases, as a *general* matter. This is because *McCleskey* and *Armstrong* still rule the roost. Proof of statistical race disparity, without proof of case-specific, biased racial intent, cannot lead to relief for any defendant.[134] Similarly, under *Armstrong*, although individual acts of prosecutorial discretion may be nonuniform when compared across districts (or even within offices), they are *not* grounds for relief in any particular case (again, absent case-specific proof of impermissible bias: race, gender, speech—but not simply strong dislike for a defendant or his acts). Inconsistent acts of prosecutorial discretion, while a basis for administrative concern by the Department of Justice, do not permit substantive relief under *Armstrong* or other like cases.

Let us therefore assume that during a death sentence moratorium, brilliant scholars, genius lawyers and powerful politicians form a well-endowed "blue ribbon commission" to study race-bias and prosecutorial unfairness in the system.[135] Happily, if unexpectedly, the commission actually identifies specific points in the system and specific acts by investigators and prosecutors that *cause* bias and unfairness. They recommend a number of wonderful changes that will prevent such events and "cure" the capital punishment system of all such problems. Unrealistic? Certainly.

---

133. Paul may have stronger claims based on his equally culpable co-defendant receiving life and the lack of "specialness" to support selection of his case for federal capital prosecution. *See supra* text accompanying notes 85-87. I believe a depoliticized clemency process, as well as habeas, should serve to address cases like this one.

134. *See* United States v. Bin Laden, 126 F. Supp 2d. 256, 261 (S.D.N.Y. 2000). ("At its core, . . . *McCleskey* stands for the notion that, by themselves, systemic statistics cannot prove racially discriminatory intent in support of an equal protection claim by a particular capital defendant."). I do not contend that *McCleskey* dooms all statistically-based death penalty attacks, but merely that something more, something that is *case-specific*, must also be shown. *Cf.* John H. Blume, Theodore Eisenberg and Sheri Lynn Johnson, *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1806 (1998).

135. *See, e.g.*, S. 3048 (introduced on Sept. 14, 2000) (proposing the "Federal Death Penalty Moratorium Act of 2000," Section 201 of which would establish such a Commission). S. 3048 was not enacted; its sponsors, however, have reintroduced it as S. 233 in the new, 107th Congress.

In addition, *unnecessary*: a moratorium on current cases need not be declared for such a Commission to be formed, conduct studies and recommend and institute all the "best practices" we hope they will identify. But most importantly, *unhelpful*: such a systemic study would, it seems, provide no relief for those currently on federal death row.

Why is such a study unhelpful to those already on death row? Because unless case-specific illegalities or acts of racial bias are found in their individual cases, *Armstrong* and *McCleskey* operate to deny them relief. Of course, the executive branch, or possibly Congress, might decide to grant relief retroactively, on suspicion that past individual cases were likely to have been impermissibly affected by identified bad practices. But where is the evidence, in the call for a moratorium, that anything like that unrealistic scenario could happen? "Wishful Thinking," as Professor John Wefing writes elsewhere in this issue, is right.[136]

Let me repeat: I am all for intensive, individual, case-specific reviews of *every* death penalty case, in order to root out provable race or other impermissible bias, before any execution is permitted to occur. I would support the Attorney General if he were to order such an independent review for every current federal death row occupant. And if proof of impermissible race or prosecutorial bias is found, by all means grant the defendants appropriate relief (new trials or sentencing). Yet such additional reviews seem superfluous, in light of the intense scrutiny that federal cases already receive in the judicial review, habeas, and clemency processes. If there is dispositive evidence of such bias or unfairness, it will come to light. Cases like David Ronald Chandler's, as well as the 20% reversal rate for federal death sentences so far, demonstrate this point, and there is no evidence to the contrary.

It is possible to imagine a brief moratorium for independent review of all cases currently on federal death row. It might be that an independent federal commission, with subpoena power and the access of a Department of Justice insider, could find evidence that the courts and defense counsel cannot.[137] But, I am constrained to say, I doubt it. I simply do not find any current reason to distrust the existing federal system of review enough to support such a review moratorium. The hard fact is that every occupant currently on federal death row has been well-proven to have committed one or more brutal murders that, when individually reviewed, can easily support a death penalty. (I personally find Jeffrey Paul close to the line here, but reasonable others could disagree, and have.) If we are to have capital punishment, the occupants of federal death row all seem to be ap-

136. John B. Wefing, *Wishful Thinking By Ronald J. Tabak: Why DNA Evidence Will Not Lead to the Abolition of the Death Penalty*, 33 CONN. L. REV. 861 (2001).

137. *See* David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000) (describing the creation and operation of a similar commission in Great Britain).

propriately subject to it. Until that changes, a moratorium—as opposed to much further study, which I support—is unnecessary.

VI. GEOGRAPHIC DISPARITY PROVIDES EVEN LESS JUSTIFICATION FOR A MORATORIUM

There is no doubt that the death penalty is disparately administered across the United States. That is, similar murders are treated differently in different parts of the country, by legislators, prosecutors, courts, and juries. In thirteen American jurisdictions, no death penalty is permitted, by statutory or constitutional command, no matter how heinous the crime.[138] Other states, while having capital punishment on the books, have not executed anyone in decades.[139] Thus, for example, Texas executed forty persons last year, California only one.[140] Similar crimes are treated differently in different regions: a simple robbery-murder can receive the death penalty in Arkansas but only passing media interest in New York City.[141] Indeed, Richard Willing of *USA Today* has demonstrated that the death penalty today is disparately administered at the most basic, local level: across *counties* within the same state.[142]

Similar disparities exist in administration of the federal death penalty, even despite Janet Reno's efforts to "nationalize" the prosecution of federal capital cases. For example, some districts send in large numbers of potential cases for review at Main Justice, while others have identified no killings as potential capital cases in over a decade of capital availability.[143] It is also easy to identify crimes similar to those committed by some of the current occupants of federal death row that did not result in a death penalty or, indeed, even a capital prosecution.[144]

We do not need further study to investigate or demonstrate such disparity. It is a fact of life, at *every* level of the criminal justice system.[145] Moreover, there is no realistic likelihood that the law which permits such disparity will change. What benefits then, can a moratorium yield, in this

138. *See* Snell, *supra* note 34, at 1 (Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin).

139. *See* Little, *History*, *supra* note 12, at 451 (as of January 1999, nine states with statutory death penalties had executed no one since before *Furman*, and another seven states had executed only one or two defendants in thirty years).

140. Snell, *supra* note 34, at 12.

141. *See* Little, *History*, *supra* note 12, at 499 & n.686 (citing New York and Arkansas examples).

142. *See* Richard Willing, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at A1, *at* LEXIS, News Library, Usatdy File.

143. In fact, over 30% of all potential federal death penalty cases have come from just 5 of the 93 federal districts. Meanwhile, over twenty federal districts have never sent in a case for review since the federal death penalty was revived in 1988. Little, *Future*, *supra* note 11, at 560.

144. *See, e.g.*, Memorandum in Support of Clemency, *supra* note 59, at 68-76.

145. *Accord McCleskey*, 481 U.S. 279, 312 (1987) ("Apparent disparities in sentencing are an inevitable part of our criminal justice system.").

area? Again, if individual case reviews will reveal arbitrariness of such a degree that a reasonable Executive would grant relief, then I am all for it. But no cases currently on federal death row suggest the presence of such raw disparity. Nor is a general moratorium required to conduct such individualized case reviews.

That the jurisprudence of capital punishment does not prohibit uneven capital case results is, for better or worse, well-settled. As *Armstrong* teaches, prosecutorial discretion to choose which cases to prosecute capitally is broad and largely unreviewable. Moreover, the Constitution prohibits *limiting* the capital sentencer's discretion to find mitigation in any capital-eligible case.[146] So long as we permit individualized mitigation (by prosecutors, judges, or jurors), disparity is inevitable. And yet it is unwise to argue that we do not want such individualized discretion to exist—it is the source of compassionate mercy to which every defendant in a capital prosecution appeals. Prosecutors, judges, and juries must retain the discretion to be merciful, or we shall truly have a system that lacks all humanity.

Yet if we endorse individualized mercy, we must then accept seemingly uneven results. While no two cases are ever identical, it is also true that different prosecutors, judges and jurors will evaluate similar cases differently on occasion. Perfect uniformity in the area of criminal sentencing is impossible to achieve. Nor do I believe that moratorium supporters would argue for a discretionless (that is, mandatory) capital sentencing system (unless, again, abolition were the result).[147]

Long ago, in *Gregg*, the Supreme Court rejected the argument that capital case disparities resulting from the exercise of unbiased discretion render capital punishment unconstitutional.[148] This principle was reendorsed ten years later in *McCleskey*. Moreover, although I have argued elsewhere that a sense of proportionality is required for the ethical exercise of prosecutorial discretion,[149] the Supreme Court has rejected the argument that proportionality review of capital cases is constitutionally required.[150] Some states do require automatic proportionality review of all capital cases.[151] But the 1994 Congress, presumably aware of these state proportionality requirements, did not require it in the federal statute.[152]

Finally, even general proportionality review would not provide relief

146. *Id.* at 304; Lockett v. Ohio, 438 U.S. 586, 604 (1978).

147. The Supreme Court, of course, has ruled that discretionless, mandatory death penalty statutes are unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976).

148. Gregg v. Georgia, 428 U.S. 153, 199 (1976).

149. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors Acting in an Investigative Role*, 68 FORDHAM L. REV. 723 (1999).

150. Pulley v. Harris, 465 U.S. 37, 50-51 (1984).

151. *E.g.*, GA. CODE ANN. § 17-10-35(c)(3) (2000); N.J. STAT. ANN. § 2C:11-3(e) (West 2000); N.Y. CRIM. PROC. LAW § 470.30(3)(b) (McKinney 1999); OHIO REV. CODE ANN. § 2929.05(A) (West 2000); WASH. REV. CODE § 10.95.130(2)(b) (2000).

152. *See* 18 U.S.C. § 3595 (describing the requirements for review of federal death sentences).

for the sort of intentional killers currently found on federal death row. The proportionality question is not whether similar cases can be found that did *not* receive a death penalty (there are always some), but rather whether any similar cases can be found that *did* receive a death penalty. This is usually not a difficult burden for prosecutors to carry.

Again, I can imagine a brief moratorium while every case on federal death row is reviewed for proportionality. But I cannot imagine it doing much good. Remember, every case on federal death row has already undergone centralized review by the Attorney General. Thus a centralized "proportionality review" has, in effect, already been performed.[153] Moreover it is beyond argument that every current occupant of federal death row committed a murder or murders that place him (there are no women) well within the range of other, similar killers already on death rows in this country. That is to say, even a moratorium for proportionality review, if required as a matter of policy (for it is not required by law), would provide no reason not to execute the persons on federal death row whose sentences would be delayed. No case currently on federal death row lacks equivalents already approved in the capital jurisprudence generated by the States in the last twenty-five years.

I previously have advocated a capital system that reserves the death penalty only for the worst of the worst, those high-end killers for whom Professor Baldus found there was no racial or other disparity: jurors almost always give them the death penalty.[154] A moratorium to await installation of such a system would not be unprincipled. But again, moratorium supporters demonstrate no reason to believe that such a system will ever be popularly endorsed. Moreover, such a moratorium would do no good for the "high-end" killers already on federal death row. And finally, the Supreme Court's jurisprudence—*McCleskey*, *Armstrong*, *Pulley*—stands in the way of meaningful relief for anyone currently on federal death row.

Geographic disparity, like racial disparity, is already well-

153. This centralized review does not mean that all disparity is eliminated—indeed, I believe it cannot be. For example, different Attorneys General and their staffs may apply somewhat different discretionary criteria. Janet Reno, personally opposed to capital punishment, may have denied approval for some cases that another Attorney General might not. In addition, even a three-person review committee in the same Administration may disagree among themselves. For example, I might be disposed to grant "proportionality relief" to Jeffrey Paul, while other members of the same Democratic Department of Justice would not. Such examples merely showcase the individual variability that is inevitable in any system administered by human beings. A further argument, however, that it also provides grounds for relief from the death penalty is, purely and simply, an argument for abolition, not moratorium.

154. *See* Little, *History*, *supra* note 12, at 502-07 (advocating limitation of capital punishment to the most extreme cases and labeling this the "Stevens Solution" after Justice Stevens' dissent in *McCleskey*, 481 U.S. at 367: "There exist certain categories of extremely serious crimes for which . . . juries consistently impose[] the death penalty without regard to . . . race . . . ."). Professor Baldus discusses the "high-end" no-bias phenomena in his book, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 385 (1990).

demonstrated—the question is, what can a moratorium *do* about it? Without a persuasive, fair answer—fair to victims, families, and communities that have been damaged by killers like McVeigh, and persuasive to their supporters—a federal death penalty moratorium is a chimera, an illusory palliative for ills that our current jurisprudential and legislative system has no likelihood of, let alone interest in, addressing.

CONCLUSION

Before any capital penalty is carried out, we should be firmly convinced of a defendant's legal, as well as moral, guilt. A final "innocence review" should always be conducted; but that is, in effect, what a clemency petition is or ought to be.[155] Moreover, we should be confident that a capital defendant's case is free from impermissible race-bias, prosecutorial vindictiveness or any other blatant unfairness. I have no quarrel with a system that ensures we have confidence in guilt and fairness at the end of the capital punishment process.

The American people have, however, consistently endorsed capital punishment for the worst of the worst. By existing standards, the federal system is fair in its design as well as its administration for carrying out this somber decision. There appear to be no actually innocent defendants on federal death row (and if there are they will be discovered and granted relief). Meanwhile, current Supreme Court precedents would provide no relief even if racial and geographic disparity claims were studied and proved beyond peradventure. When defendants like Timothy McVeigh cannot realistically hope for relief from moratorium studies, why should their executions be delayed? Even if individual cases may yet warrant further review, the case for a broad, undifferentiated moratorium for federal capital cases simply has not been made.

I end as I began. I have deep concerns regarding the fair administration of capital punishment in this country, and thus my head is at war with my heart in sponsoring an "anti-moratorium" essay. But other than salving our own, personal guilt about having a capital punishment system at all, a moratorium offers no realistic likelihood of truly substantive relief. It has no defined goals and little likelihood of altering the public's apparent desire for the most extreme penalty in the most extreme cases. Further study of the capital system, race bias issues, and other aspects of the criminal justice system that give us pause should, and indeed must, continue. But a moratorium is unnecessary to continue such study. To be blunt, a moratorium may make us feel good, but it is unlikely to do any good. Advocates must recognize this result-based ground of opposition, and shift their efforts to meeting it with definiteness, clarity and detail.

155. *See* Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1500-08 (2000).